Supreme Court, U.S.
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No. 02-0679

In The

Supreme Court of the United States

DESERT PALACE, INC., dba
CAESARS PALACE HOTEL & CASINO,

Petitioner,

v.

CATHARINA F. COSTA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are Desert Palace, Inc., d.b.a. Caesars Palace Hotel & Casino, Petitioner, and Catharina Costa, Respondent. Caesars Palace, in its corporate disclosure (p.ii) of the Petition disclosed Park Place Entertainment, Inc. as owner of Desert Palace, Inc.

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I.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Court's Decision Does Not Conflict With The Court's *Price Waterhouse* Decision Or The 1991 Amendment To Title VII

This court, in the *Price Waterhouse v. Hopkins* case, 490 U.S. 228, 109 S. Ct. 1775 (1989), adopted the "mixed motive" method of proving disparate treatment. Basically, the mixed motive theory arises when an improper motive, such as gender discrimination, is present along with a legitimate motive for the specific action taken against an employee by the employer. In such an instance, this court allowed an employee to establish a prima facie case by proving that an improper motive came into play and the burden shifted to the employer to prove that the action taken against the employee would have occurred even if the improper motive had not existed.

The concurring opinion of Justice O'Connor in *Price Waterhouse* gave birth to the direct evidence language that has found its way into the mixed motive cases. The "direct evidence" language used by Justice O'Connor created the problem of what was meant by that language. Was it meant to restrict the type of evidence that could be used or was it intended to heighten the burden of the plaintiff? Circuit courts have, admittedly, used different approaches not knowing what was intended as the proper approach.

The plurality in the *Price Waterhouse* decision refused to establish an evidentiary criterion and certainly did not establish a heightened burden for the plaintiff. The plurality stated:

"By focusing on Hopkins specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and *we refrain from deciding here which specific facts standing above, would or would not establish a Plaintiff's case, since such a decision is unnecessary in this case.* But see post, at 277 (O'Connor, J., concurring in judgment)." Id. at pp. 251 & 252 (Emphasis added).

The plurality also stated:

"We think these principles require that, once a plaintiff in a Title VII case shows that gender played a *motivating part* in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights." Id. at pp. 244 & 245 (Emphasis added).

Subsequent to the *Price Waterhouse* decision, Congress, in 1991, amended Title VII adopting the language of the plurality:

> "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

Congress did not apply a heightened burden of proof upon the plaintiff nor did Congress go beyond the "motivating factor" standard established by the plurality. In

plain language, Congress stated that a plaintiff need merely "demonstrate" that gender was a motivating factor.

Justice O'Connor's direct evidence language did not survive the pluralities' view, which was ultimately adopted by Congress with respect to burden of proof and the evidence necessary.

Clearly, the Ninth Circuit was well within the parameters established by the plurality in *Price Waterhouse* and the Ninth Circuit decision does not conflict with either *Price Waterhouse* or the 1991 Amendment to Title VII.

The Ninth Circuit has ruled that all the evidence presented by the plaintiff, whether circumstantial or direct, is admissible to make the determination as to whether a mixed motive case has been established, and they have elected not to create a burden of proof upon the plaintiff that wouldn't apply in any other civil case. The court said, "Here too, we believe that we are well advised to follow the statute instead of engaging in judicial invention." (Petitioner's App. 19a).

B. The "Direct Evidence" Conundrum

All through Petitioner's Petition for Writ of Certiorari, Petitioner refers to Justice O'Connor's direct evidence language but makes no attempt to define whether it means direct evidence as opposed to circumstantial, or whether it means a heightened burden of proof required of the plaintiff. Petitioner cites a number of cases for the proposition that the Ninth Circuit decision is in conflict with other circuits, however, a reading of the cases will indicate that some define direct evidence as allowing all evidence presented by the plaintiff, which does not conflict

with the Ninth Circuit decision, and the others deal with a heightened burden which the Ninth Circuit did not agree with.

The Ninth Circuit chose not to be drawn into the direct evidence conundrum and instead, chose to look to the 1991 Amendments as a resolution.

C. The Direct Evidence Language Established By Justice O'Connor Is Not Binding

Justice O'Connor was only one Justice writing a concurring opinion in a majority opinion. The plurality consisted of four Justices who joined in the opinion written by Justice Brennan.

As stated before, the plurality did not impose a direct evidence rule but did establish the language adopted in the 1991 Amendments. In this light, a Circuit Court would not have to feel bound by language in a single Justice's concurring opinion.

D. Abuse of Discretion

The Ninth Circuit, as did the *Price Waterhouse* decision, recognized that the District Court trial judge, after all the evidence, would make the determination of whether a mixed motive instruction should be given. See: *Price Waterhouse* p. 247, fn. 12.

The Ninth Circuit applied the abuse of discretion standard of review to the giving of the mixed motive instruction by the trial judge (Petitioner's App. 32a) and

concluded that the "district court did not abuse its discretion in giving a mixed motive instruction." (Petitioner's App. 35a).

E. Denial of Motion for Judgment as a Matter of Law

The Ninth Circuit applied the standard applicable to granting of a motion for judgment as a matter of law which is the vehicle used by Caesars to appeal to the Ninth Circuit and to present its Petition for Writ of Certiorari to this court.

The Ninth Circuit applied the very strict standards that are required by law and which favor the plaintiff's position. After a thorough analysis, the court concluded that a motion for judgment as a matter of law was not appropriate. (Petitioner's App. 35a-43a).

II.

MISSTATEMENT OF FACT AND LAW

Petitioner at pages 4 and 5 of its petition makes reference to the "mixed motive" instruction given to the jury. Petitioner claims the instruction was given "over the objection of counsel for Caesars."

This statement is incorrect. Caesars' counsel requested the single motive (*McDonnell Douglas*) instruction, and when asked by the District Court Judge about instruction 10 (mixed motive), Caesars counsel replied, "And I'll agree with the Court, that it is a reasonable statement of the 'mixed-motive' instruction so . . . ." The instruction was in fact a Ninth Circuit model instruction previously adopted by the Ninth Circuit.

The Ninth Circuit, in its opinion discussing the mixed motive instruction and its wording, ruled, "Caesars, however, waived any objection to the form of the instruction by conceding at trial that it was 'a reasonable statement of the mixed motive instruction'." (Petitioner's App. 34a).

CONCLUSION

The Ninth Circuit's decision is not in conflict with *Price Waterhouse* or the 1991 Amendments to Title VII.

The giving of "mixed motive" instructions to the jury, in the discretion of the trial judge, was not an abuse of discretion, as ruled by the Ninth Circuit. Applying the standards of review, applicable to a motion for judgment as a matter of law, gave rise to a proper decision by the Ninth Circuit that Caesars was not entitled to a judgment as a matter of law.

The Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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